No. 1801

United States Circuit Court of Appeals for the Ninth Circuit

F. E. EARNHART,

Appellant,

vs.

JOHN B. SWITZLER,

Appellee.

APPELLANT'S BRIEF.

Upon appeal from the United States Circuit Court for the District of Oregon.

R. J. SLATER and JAMES A. FEE,

Solicitors for Appellee.

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STATEMENT OF THE CASE.

This is a suit brought by the appellee, in the court below, for the purpose of obtaining a decree, restraining order, preliminary injunction and judgment for damages, against the defendant, to protect the complainants actual possession of a tract of unsurveyed land, a part of the public lands of the United States.

The principal point relied upon by appellant, arises upon the construction to be given the Bill of Complaint, which need not be printed in this brief as it is found complete in the printed transcript pages 3 to 9 inclusive.

The second point relied upon arises upon the action of the court below in striking from the files the answer of the defendant, which was done upon the motion of the complainant for reasons hereafter stated.

Upon filing the complaint, the court granted a restraining order against the defendant, and ordered a hearing for the defendant to show cause why a preliminary injunction should not be granted. The defendant appeared and made a showing and filed a demurrer to the Bill of Complaint, specifying three grounds.

At the hearing the Demurrer was argued and submitted. The court without taking the matter under advisement granted the preliminary injunction as prayed for in the Complaint.

The Demurrer is found in the transcript on pages 12 and 3.

The Demurrer was overruled and the defendant was given until the 7th day of June, 1909, to answer, that day being the June rule day of the court. (Transcript pp. 13 and 14.)

Upon the 1st day of June, 1909, the defendant filed an answer, (Transcript pp. 15 to 21), but failed to serve a copy thereof upon the complainant or his solicitors or to leave a copy with the clerk for them as the rules require.

Thereupon the complainant by his solicitors moved under rule 7 to strike the answer from the files of the court and for an order pro Confesso. (Transcript 22.)

This motion was supported by an affidavit by R. J. Slater, one of the solicitors for complainant. (Transscript p 23.)

A counter affidavit was filed by J. B. Perry stating in effect that the failure to serve copy of the answer was an oversight on the part of counsel for the defendant. (Transcript pp. 24 and 25.)

Thereafter the court sustained the motion and the answer was stricken from the files. (Transcript pp. 26 and 27.)

Thereafter defendant moved to vacate the order striking out the answer which motion was overruled, (transcript pp. 27 to 30 inclusive), and the cause went to a final decree as prayed for except for damages which were waived. (Transcript pp. 31 to 37 inclusive.)

From the decree the defendant appeals to this court and states 16 specifications of error. (Transcript pp. 37 to 46 inclusive.)

In his brief the counsel for appellant abandons all but two viz. 1st. That no federal question is presented by the Bill of Complaint, and, 2nd. The court erred in striking out the defendants answer.

We will consider them in the order presented by the appellant's counsel, but under the head of the federal

question we will necessarily refer to several sub-heads.

POINTS AND AUTHORITIES

Any person qualified to enter public land of the United States under the homestead laws thereof, has the right to settle upon, occupy and improve unsurveyed lands.

Sec. 3, Act approved May 14, 1880, 21, Stat at L. 140.

The courts recognize and protect such rights.

Buxton vs. Traver, 130, U. S., 232, 32 L. Ed. 920.

Washington & I. R. Co. vs. Osborn 160, U. S. 103, 40 L. Ed. 356.

A settlement upon the public lands can not be made upon any such that is in the actual possession of another.

First in time is first in right.

Atherton vs. Fowler, 96 U. S., 513, 24, L. Ed. 732.

The last principal stated applies to unsurveyed lands.

Washington & I. R. Co. vs. Osborn, supra.

Nelson vs. N. R. P. R. Co., 188, U. S. 108, 47, L. Ed. 413.

Courts of equity protect by injunction the rightful possession of public lands.

Hoover vs. Jones, 217, Fed. 222.

Reams et al vs. Oliver, 41 Pac., 355.
Sprout vs. Durland 35 Pac. Rep., 689.

A question depending for solution upon the laws of the United States presents a federal question, which confers jurisdiction upon the United States courts.

McCune vs. Essig, 199, U. S. 382, 50, L. Ed. 237.
Spokane Falls & N. R. Co. vs. Zigler, 167 U. S. 65, 42, L. Ed. 79.

Under rule 7, of the Rules of the United States Circuit Court for the Ninth Judicial Court, District of Oregon, the court had no discretion as the court was bound by the rule as well as the parties.

Rio Grande I. & Co. vs. Gildersleeve, 174 U. S., 604, 43, L. Ed. 113.

Rule 7, of the United States Circuit for the district of Oregon, is as follows: "A party filing a pleading, other than those mentioned in Rule 6, (complaint, petition or bill), must, within the time allowed to file the same, serve a certified copy thereof on the adverse party, or his attorney, if he have one; and, in case the party filing such pleading fails to serve a copy thereof as herein provided, the adverse party may either obtain such copy

from the clerk's OFFICE AND HAVE THE COST OF THE SAME TAXED AS A DISBURSMENT, OR, ON MOTION, HAVE SUCH PLEADING STRICKEN FROM THE FILES OF THE CASE AND PROCEED THEREAFTER AS IF IT HAD NOT BEEN FILED."

Having stricken the answer from the files, the court doubtless had the discretionary power to vacate its order upon a showing of excusible neglect, mistake or accident, but it had no arbitrary power to do so, in the absence of such a showing.

Carter vs. Wakeman, 47 Ore., 212.

ARGUMENT.

Before criticizing the cases cited by the counsel for the appellant, we will briefly present what we have to say about our own points and authorities.

The startling array of specifications of error which confronted us in this appeal, had caused us to believe that counsel would probably deal in many fine drawn distinctions and subdivisions of his points, and we are very much gratified at the briefness of his argument, and the sparceness of his points and authorities.

The federal question being the first to present, we naturally look to the United Statutes and the decisions of the United States courts for one that is satisfactory.

The general definition given by the Supreme Court of the United States in McCune vs. Essig, 199 U. S. 199, 382, 20, L. Ed. 237, is peculiarly plain and simple as well as being the gist of a case very similar to the one at bar since it involved the construction of the homestead

laws of the U. S.

The court said: "A question depending for solution upon the laws of the United States presents a federal question, which confers jurisdiction upon the United States courts."

How it is possible for counsel to see or present any way for the court in the case at bar to distinguish this case from the one cited is an enigma; how it is possible for any court to consider the facts alleged in the bill of complaint without being compelled to read, construe and apply the statute of the United States approved May 14th, 1880, 21, Stat. at L. 140, can not be imagined.

The very fist thing to ascertain in this case is a federal question, viz. Had the complainant a right to settle upon and take possession of the unsurveyed lands of the United States?

The question can not be answered without reading and applying the statute above referred to.

The very next question that suggests itself, in pursuing the case is also a federal question, viz. Taking the complaint as true, as we must under the circumstances. what are the legal and equitable rights of the plaintiff, as against a trespasser upon his possession? That question can not be answered without refering to the same statute and to similar ones and the decisions of the United States courts construing and applying them, and when we do that we discover the solution in the principal laid down by the Supreme court in the case of Atherton vs. Fowler, 96, U. S., 513, 24, L. Ed. 1130, and the great list of cases that follow it, that a settlement right can not be initiated by a trespass upon land in the actual possession of another, when the possession is rightful and under the laws

of the United States. And we go just a step further and we learn that a person in the rightful possession of the unsurveyed lands of the United States is not a trespasser, Buxton vs. Traver, 130 U. S., 232, which is another federal question presented by the bill of complaint. In a case of this kind it is utterly impossible to eliminate the federal question. In the case of Washington & I. R. Co. vs. Osborn 160 U. S., 103. 40, L. Ed. 356, there was a federal question because of the rights confered by the same statute which we have cited, although the jurisdiction did not depend upon that fact, and so in the case of Nelson vs. N. P. R. Co., 188, U. S. 108, 47 L. Ed. 406, where the court says of the statute under consideration, that it is a distinct confirmation of the rights of a qualified person who had theretofore or thereafter settled upon any of the public lands of the United States whether surveyed or unsurveyed.

The defendant can not get away from the federal question in this Bill of Complaint and the only other point presented has no merit. A rule of court has all the force and effect of law and binds all parties and the court and when a party applies to a court for the exercise of a discretion he is required in all cases to give some good reason why that discretion should be extended to him, and if he can give no good reason there can be no excuse for refusing it and such rules are constantly being inforced, yet courts are always liberal. The only excuse offered by counsel for appellant for not complying with the rule was that it was their oversight, and such an excuse can possibly have no merit since it would be resorted to in every instance and the effect would be to destroy the force of any rules whatever. Carter vs. Wakeman, 47 Ore., 212.

The counsel asserts that the answer was meritorious, but in that we can not agree with him, for he admits in his answer (paragraph 4, page 16 of the Transcript), that complainant purchased the rights of Dave Bevert and paid him a valuable consideration therefor, and in paragraph 6, thereof, he admits that the complainant had put some additional improvements upon the island, which were of some value, the amount being immaterial since by those admissions it becomes certain that the defendant knew that Hatter was in possession as the tenant of the complainant.

If the property was worth $2000 as counsel for the appellant freely asserts in his brief, who was that made it so valuable if not the complainant? the appellant has not explained in the answer how he ever contributed one cent toward the improvement of the property and he never did or else he doubtless would have made it known with as much force as possible.

This is a case of a man (the appellant) trying to reap where he hath not sown, and there is no merit in such a defense.

Smith vs. Hy-yu-tse-milkin. Fed.

As to the authorities cited by counsel we wish to say:

Butler vs. Shaffer. 67 Fed., 161, upon the point of Federal questions, apparently, is with appellant, but a careful reading of the decision discloses a wide difference. In that case the complaint showed that Butler, the complainant, was out of possession, while here the complainant, the appellee is in possession, under the laws of the United States, and those laws must be construed in order to determine whether he has any right to maintain his possession against the defendant. That difference

brings our case strictly within the rule laid down in McCunne vs. Essig, 199 U. S. 382, 50 L. Ed. 237, and 122 Fed. 588, which in effect overruled Butler vs. Shaffer.

Gold Washing and Water Co., 96 U. S. 199, no pretension was made in the complaint to state a federal question and it was only raised in the petition for removal, and the court held that it should appear in the complaint.

The Florida Central & Peninsular R. Co. vs. Bell was a ejectment case wherein the plaintiffs exhibited a perfect legal title, but undertook to interpolate a federal question by anticipating the defense, and the court held that it could not be done, and the case is not in point.

We have to find fault with Mitcalf vs. City of Waterman, 128 U. S., 586, for the point is conceded that the federal question must be disclosed in the complaint and the other cases are to the same point.

Most respectfully submitted,

FEE & SLATER.
Counselors for Appellee.